

LAWRENCE G. WASDEN

Attorney General

CLIVE J. STRONG

Chief, Natural Resources Division

Deputy Attorney General

Office of the Attorney General

P.O. Box 44449

Boise, Idaho 83711-4449

Telephone: (208) 334-4124

Email: clive.strong@ag.idaho.gov

Fax: (208) 334-2690

ISB # 2207

**IN THE DISTRICT COURT OF THE FIFTH JUDICIAL DISTRICT
OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF TWIN FALLS**

In Re SRBA

Case No. 39576

_____)
)
)
)
)

Subcase No. 92-00021-37

BRIEF IN SUPPORT OF MOTION FOR

ORDER OF INTERIM ADMINISTRATION

FOR WATER RIGHTS IN BASIN 37 PART 1 SW

DESCRIPTIVE SUMMARY

This document is the State of Idaho's brief in support of its Motion for Order of Interim Administration, which seeks authorization for administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basin 37 Part 1 Surface Water ("SW") in accordance with the most

current Director's Report,¹ or in accordance with partial decrees that have superseded the Director's Reports.

BRIEF

I. INTERIM ADMINISTRATION OF WATER RIGHTS IS REASONABLY NECESSARY TO PROTECT SENIOR WATER RIGHTS.

A. Introduction

Administration of water rights is the distribution of water to water users in accordance with the prior appropriation doctrine as set forth in Idaho law. The primary statutory mechanism for distribution of water in accordance with the prior appropriation doctrine in Idaho is through creation of a water district and the office of watermaster within that district under the supervision of the Director (hereinafter "Director") of the Idaho Department of Water Resources (hereinafter "IDWR"). Idaho Code § 42-602 *et seq.*

The Director has the authority to create a water district upon entry of a court decree that determines the water rights within the geographic boundaries of the proposed water district, Idaho Code § 42-604, or upon entry of an order from the district court that authorizes the use of a Director's Report for purposes of interim administration. Idaho Code § 42-1417. Under Idaho Code § 42-1417, the SRBA district court may order interim administration in accordance with the Director's Report upon a determination that administration is reasonably necessary to protect senior water rights. As demonstrated below, the purpose for seeking interim administration is to

¹ The Director's Report for Basin 37 Part 1 SW is being filed the SRBA district court simultaneously with this motion for interim administration. The Director's Report for Basin 37 Part 1 Ground Water ("GW") was filed on August 8, 2002.

provide a legal mechanism for the Director to administer both surface and ground water rights pursuant to chapter 6, title 42, Idaho Code,

B. Interim Administration is reasonably necessary for efficient administration of water rights.

Interim administration of water rights in Basin 37 Part 1 SW is reasonably necessary because an efficient means of administering water rights from ground water sources and some surface water sources in these basins does not exist. The establishment of water districts for these basins will provide the watermasters with the ability to administer water rights in accordance with the prior appropriation doctrine as established by Idaho law. In order to fully and adequately deliver water rights, the Director needs to have all ground water rights and surface water rights organized into water districts pursuant to chapter 6 of title 42, Idaho Code. The purpose of this motion is to combine ground water rights and surface water rights in Basin 37 Part 1 SW into a water district or districts so that they may be administered conjunctively.²

C. Facilitating the implementation of conjunctive administration is a major purpose of the SRBA.

Resolving the legal relationship between ground and surface waters was one of the main reasons for commencement of the SRBA. In the 1994 Interim Legislative Committee Report on the Snake River Basin Adjudication the Committee stated the following goals for the SRBA:

All water rights within the Snake River Basin should be defined in accordance with Chapter 14, Title 42 so that all users can predict the risks of curtailment in times of shortage. It is vital to all water users that they have as high a degree of certainty as possible with respect to their water rights. Uncertainty discourages development, undermines the ability of agencies to protect stream systems and fosters further litigation.

² The State of Idaho's motion for interim administration does not seek administration of domestic and stockwater rights as defined under Idaho Code §§ 42-111 and 42-1401A(11).

1994 *Interim Legislative Committee on the Snake River Basin Adjudication* at 32. The Committee went on to state, “In fact, the Snake River Basin Adjudication was filed in 1987 pursuant to I.C. § 42-1406A, in large part to resolve the legal relationship between the rights of ground water pumpers on the Snake River Plain and the rights of Idaho Power at its Swan Falls Dam.” 1994 *Interim Legislative Committee* at 36.

It was initially expected that upon completion of the SRBA, water districts would be created pursuant to chapter 6, title 42, Idaho Code, to, among other functions, protect senior water rights from injury caused by junior water rights diverting from hydraulically connected sources within the Snake River Basin in Idaho. The legislature recognized that there might be a need for earlier interim administration of water rights during the pendency of the general adjudication and, therefore, authorized the SRBA district court to “permit” the Director to distribute “water pursuant to chapter 6, title 42, Idaho Code” in accordance with applicable partial decree(s) and/or with Director’s Report(s) upon a finding that such administration is reasonably necessary to protect senior water rights. Idaho Code § 42-1417.

D. Creation Of Water Districts Is Reasonably Necessary to Protect Senior Water Rights.

As Tim Luke, Section Manager for the Water Distribution Section for IDWR, states in his affidavit ground water in Basin 37 Part 1 is included in a water district, however, certain surface water sources, specifically spring and stream sources tributary to the Snake River near the Malad River, have not been included in any water district. *Affidavit of Timothy J. Luke*, at 3. While IDWR has created water measurement districts in these areas, the measurement districts’ authority is limited to measurement and reporting of diversions and does not include authority for the administration of water rights, or the enforcement of water right conditions. *Id.* at 3. The

formation of water districts will allow water to be distributed in accordance with the prior appropriation doctrine as established by Idaho law.

The creation of water districts is an important step in the administration of water rights. Water districts provide mechanisms for administration, regulation, and enforcement of water rights. *Id.* They also provide a means for incorporating regular measurement and reporting of diversions, including ground water diversions. *Id.* In addition, water districts provide for local and timely response to general calls for water distribution and provide a system whereby a local watermaster can provide timely assistance and expertise to water users and respond to their complaints. *Id.* Furthermore, water districts provide for improved management of water rights records, specifically maintaining current ownership information. *Id.* Creation of water districts provides an equitable funding mechanism for these services. *Id.* The water users will fund the costs of the watermasters as provided for by Idaho Code §§ 42-605A and 42-612.

Because all of the water rights in these basins are partially decreed in the SRBA or recommended in Director's Reports, it is appropriate that water districts be established to administer the water rights within Basin 37 Part 1 SW. Establishment of water districts also will enable the Director and participating water right holders to take further steps toward long-term administration of the resource.

The watermaster duties in the new water districts will be to (1) curtail illegal diversions (i.e., any diversion without a water right or in excess of the elements or conditions of a water right); (2) measure and report the diversions under water rights; and (3) curtail out-of-priority diversions determined by the Director to be causing injury to senior water.

II. THE DIRECTOR'S REPORTS AND PARTIAL DECREES PROVIDE AN ADEQUATE LIST OF WATER RIGHTS FOR PURPOSES OF INTERIM ADMINISTRATION.

Chapter 6 recognizes that distribution of water requires an accurate listing of water rights. Idaho Code § 42-604, providing for the creation of water districts, applies only to "streams or water supplies" whose priorities of appropriation have been adjudicated by courts having jurisdiction thereof. The Idaho Supreme Court has recognized the importance of an accurate list containing the description of the water rights to be administered. In *Nettleton v. Higginson*, 98 Idaho 87, 558 P.2d 1048 (1977), the Idaho Supreme Court stated: "Only by having a specific list reciting the names of water users, with their dates of priority, amounts, and points of diversion can a system be administered." *Id.* at 91, 558 P.2d at 1052, quoting *DeRousse v. Higginson*, 95 Idaho 173, 505 P.2d 321 (1973).

Before the court can issue the order of interim administration, it must find that the individual partial decrees that supersede the Director's Report for individual recommendations and the latest filing of Director's Reports where partial decrees have not been issued are an adequate listing of the owners of and the elements of the water rights for the purposes of interim administration of a water source. Idaho Code § 42-1417 contemplates that the Director's Reports constitute an adequate listing, since all the claims have been investigated by state officials and reported to the court. The statute assures procedural due process by requiring notice to the claimants and by allowing the court to modify the Director's Report for purposes of interim administration. The statute also contemplates that the partial decrees provide an adequate listing of water rights for purposes of interim administration because these rights have not only been investigated by state officials, but have also withstood the scrutiny of court review. Thus, the Director's Reports and the partial decrees meet the need for administration pending the

completion of the adjudication. Upon entry of an order for interim administration, the creation of water districts and the distribution of water thereunder will occur in accordance with the normal administrative mechanism created by chapter 6, title 42, Idaho Code.

III. NOTICE IS BEING PROVIDED TO EACH CLAIMANT THAT WILL BE SUBJECT TO THE INTERIM ADMINISTRATION ORDER.

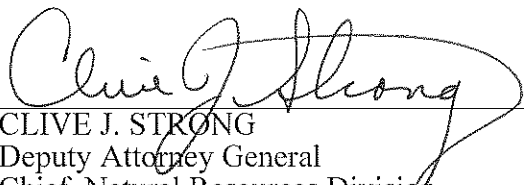
Idaho Code § 42-1417 requires that notice be given to “each claimant of water from the water system or portion thereof that could reasonably be determined to be adversely affected by entry of the order” The State of Idaho is mailing notice of this motion to all claimants who may be subject to interim administration if this motion is granted. Therefore, the notice provisions of Idaho Code § 42-1417 are satisfied.

CONCLUSION

Interim administration, as requested in the State’s motion, is reasonably necessary to prevent injury to senior water rights in Basin 37 Part 1 SW as required by Idaho Code § 42-1417. The Director’s Reports for this Basin and the partial decrees that supersede the Director’s recommendations are based on examination of the claims and the water system as required by Idaho Code § 42-1411. As such, the Director’s Reports and the partial decrees constitute an adequate listing of water rights for purposes of administration of water rights pending entry of a final decree of the water rights. Therefore, the State requests that the Court enter an order permitting the administration of water rights pursuant to chapter 6, title 42, Idaho Code, in Basin 37 Part 1 SW in accordance with the definition of water rights listed in the Director’s Reports and, where superseded, in accordance with the partial decrees.

DATED this 2nd day of Nov. 2005.

LAWRENCE WASDEN
Attorney General



CLIVE J. STRONG
Deputy Attorney General
Chief, Natural Resources Division